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**IN THE CHANCERY COURT OF THE CITY OF RICHMOND,
VIRGINIA.**

McDONOUGH'S ADM'R v. BOYLE.

July 20, 1911.

Priority between Funeral Expenses and Taxes against Decedent or His Personal Estate.—While taxes assessed against a decedent or his personal estate during his life, but for which no lien has been acquired, are placed in the third class of debts in order of payment, and are consequently inferior to the funeral expenses, yet, if a lien had been obtained for the taxes, this lien is not displaced.

Taxes on Land Prior to Funeral Expenses and Costs of Administration.—License taxes or taxes upon personal property, are a debt due from the decedent's estate and will be payable in the third class from the proceeds of the sale of the real estate; but taxes upon the land itself being made a lien upon the land are not displaced by the provisions of § 2670, Va. Code, dealing with the real estate of a decedent, and being made by statute a lien prior to all other liens, are to be paid first out of the proceeds, and are superior to the funeral expenses of the decedent, and to the costs of administration.

Waiver of Tax Lien on Land.—In order to suppose that a tax lien on land is waived, the words of waiver must be so clear as not to admit of any reasonable doubt. The commonwealth will never be said to waive any right of preference to the payment of its revenues except by very plain words to that effect.

Amount Deducted from Proceeds of Sale of Land.—Under the provisions of § 3397-b, Va. Code, the only amount that the courts are there permitted to deduct from the proceeds of the sale of the land is the cost of the proceeding. The entire fund, less its cost, is to be applied to the payment of taxes.

Counsel for McDonough's administrator, Maurice A. Powers and Edward L. Ryan, cited and relied on the following authorities:

- Patterson *v.* Patterson, 59 N. Y., 393.
- Lullivan *v.* Horner, 41 N. J. Eq., 300.
- Booth *v.* Radford, 57 Mich., 357.
- Dillard *v.* Dillard, 77 Va., 820.
- Hildebrand *v.* Kinney, 172 Ind., 447.
- Lnyder *v.* Theme, etc., 97 N. E., 314.
- In re Skillman, 125 N. W., 343.
- United States *v.* Hahn, 37 Mo. App., 584.

H. R. Pollard, City Attorney for the City of Richmond, cited and relied on the following:

- Section 456, Code 1904.
- 18 Cyc. 549 and note on pp. 550, 557.

- 2 Cooley on Taxation, p. 866.
2 Barton Chy. Prac. 1071.
Ostenburg v. Union, etc., 93 U. S. 424.
Thomas v. Jones, 95 Va. 756.
Frasier v. Littleton, 100 Va. 9, 12.
McCandlish v. Keen, 12 Gratt. 15.
Commonwealth v. Ashlin, 95 Va. 145.

OPINION.

DANIEL, GRINNAN, J.: The City of Richmond desires to be given leave to take an exception to the report of the Commissioner, and this exception, though not yet presented, will be treated as if before the court for its action. By this exception is raised the question whether the costs of the funeral of the decedent, whose land is being subjected to the payment of her debts in this suit, are a charge upon the land or the proceeds from its sale prior in right to the tax-liens upon the land in favor of the Commonwealth and the City of Richmond. The value of the land is so small, or rather the amount of these tax-liens is so great, that, if the costs of the funeral are to be preferred to the tax-liens, a portion of the latter must go unpaid. It is claimed for the plaintiff-creditor that under section No. 2665 of the Code the funeral expenses are a first charge on the land.

It will be necessary to examine all the sections of the Code germane to the present subject, and, if possible, to place upon them such a construction as will make of them one harmonious whole, consistent with the expressed legislative intent. I think that this may be done. The sections of the Code that are to be examined are the following: Nos. 2660 and 2662, dealing with the order in which the personal estate of a decedent is to be applied to the payment of his debts; Nos. 2665 and 2670, dealing with the real estate of a decedent; and the Act of the General Assembly of Virginia now found as section 3397-b in the last Code (1904), dealing with the power of the courts to sell lands free of taxes under certain circumstances.

With regard to the personal estate of a decedent it is to be observed that while by section 2660 of the Code, funeral expenses with costs of administration are put even before the first class of debts in the order of payment and taxes are placed in the 3rd class, yet by section 2662 it is provided that no lien acquired in the life time of the decedent shall be affected by the provisions of section 2660. Therefore, while taxes assessed against the decedent or his personal estate during his life, but for which no lien has been acquired, are placed in the 3rd class and are consequently inferior to the funeral expenses, yet, if a lien has been obtained for the taxes, this lien is not displaced,

In other words, so long as the taxes assessed upon the person or the personal estate are only a debt and not a debt secured by a lien, section 2660 controls the order of payment of debts out of the personal estate of the decedent; but so soon as there has been a levy upon the personal estate for these taxes, the lien so acquired is not liable to be displaced, under the express provisions of section 2662.

With regard to the real estate of a decedent as assets for the payment of his debts, section 2665 adopts section 2660 as the guide for the distribution of the fund when raised, and section 2670 corresponds to section 2662. These four sections are consistent with each other and consistent as a whole. All taxes upon land are a lien upon the land, but these are not the only taxes that may be due and payable by a decedent's estate; for he may have neglected to pay license taxes or taxes upon personal property, and his land may be the only property he owns at the time of his death available for their payment. Therefore, in such a case, as to the license taxes or taxes upon personal property, they are a debt due from the decedent's estate and will be payable in the 3rd class from the proceeds of the sale of the *réal* estate; but taxes upon the land itself being made a lien upon the land are not displaced by the provisions of section 2670, and being made by statute a lien prior to all other liens are to be paid first out of the proceeds and are superior to the funeral of the decedent and to the costs of administration. I must construe section 2670 to have this effect, for in order to suppose that a tax-lien upon land is waived the words of waiver must be so clear as not to admit of any reasonable doubt. The Commonwealth will never be said to waive any right or preference to the payment of its revenues except by very plain words to that effect. I must say that I think that the words of section 2670 are quite sufficient to preserve the integrity of a tax-lien, even if such a statute be necessary.

The provisions of section 3397-b appear to me to sustain the view I have already expressed; for the only amount that the courts are there permitted to deduct from the proceeds of the sale of the land is the cost of the proceeding. It is quite clear that the entire fund, less this cost, is to be applied to the payment of taxes. In this very suit, in order to obtain the benefit of this section and to give to the purchaser a title clear from the tax-liens, the provisions of the section must be complied with.

Entertaining these views I shall sustain the exception. So much of the decree confirming the Commissioner's report as is in conflict with the exception must be set aside.